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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re

Case No. 21-50028 SLJ

EVANDER KANE,

Chapter 7

Debtor.

Honorable Stephen L. Johnson

FRED HJELMESET

Trustee in Bankruptcy,

Plaintiff.

vs.

**SURE SPORTS, LLC, FKA;
SURE SPORTS LENDING, LLC**

Defendant

**DEFENDANT'S MOTION FOR ORDER
(1) GRANTING JURY TRIAL AND (2)
DECLARING THAT THE BANKRUPTCY
COURT DOES NOT HAVE AUTHORITY
TO ENTER FINAL JUDGMENT; AND
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: May 9, 2023

Time: 1:30 pm Pacific Time

Place: Via Zoom Video Conference

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I**INTRODUCTION**

The first claim for relief asserted by Plaintiff Fred Hjelmeset, Chapter 7 Trustee ("Plaintiff"), for "Violation of The Miller-Ayala Act" (the "Act Claim") asserts a private right and seeks a monetary judgment against Defendant Sure Sports LLC ("Sure Sports") (i) in an amount no less than \$452,414.31, representing money allegedly paid by debtor Evander Kane ("Debtor") to Sure Sports, (see, Complaint, ¶ 76), plus (ii) actual and statutory damages of not less than \$50,000 (see, Complaint, ¶ 77), plus (iii) punitive damages (see, Complaint, ¶ 77), plus (iv) attorney's fees and costs (see, Complaint, ¶ 77). The Trustee's Act Claim is a "legal" claim (as opposed to an "equitable" claim) that existed prior to Debtor's bankruptcy case and seeks affirmative monetary relief against Sure Sports to augment Debtor's bankruptcy estate.

Accordingly, as explained in detail below, (i) the determination of the Act Claim is a "judicial power" that can only be determined by an Article III Court, which the Bankruptcy Court is not, (ii) the Bankruptcy Court does not have the constitutional authority to determine the Act Claim and enter a final judgment thereon (and Sure Sports has not and does not consent to the Bankruptcy Court's determination of the Act Claim or entry of judgment thereon; see, Sure Sports' Answer and Affirmative Defenses, ¶ 21), and (iii) Sure Sports is entitled to a jury trial (and Sure Sports does not consent to a jury trial in the Bankruptcy Court). Based thereon, the Bankruptcy Court cannot hear and determine or enter any final judgment on the Act Claim and cannot conduct the jury trial on the Act Claim to which Sure Sports is entitled. The Plaintiff's Act Claim cannot be determined in, and a judgment thereon cannot be entered by, the Bankruptcy Court.

II**STATEMENT OF FACTS**

As alleged by Plaintiff, in 2018 and 2019, prior to the commencement of Debtor's bankruptcy case, Debtor and Sure Sports were parties to various written contracts and Debtor, prior to the commencement of his bankruptcy case, paid Sure Sports for the services performed by Sure Sports for Debtor's benefit. Pursuant to Plaintiff's Complaint, Debtor, allegedly, prior to the commencement of his bankruptcy case, paid Sure Sports "at least \$452,414.31 ... pursuant to the

1 Agreements." Complaint, ¶ 61.

2 On January 9, 2021, Debtor commenced his chapter 7 bankruptcy case and Plaintiff was
3 appointed as the chapter 7 trustee of Debtor's estate.

4 On April 12, 2021, Sure Sports filed a proof of claim against Debtor's estate asserting an
5 unsecured claim in the sum of \$1,187,950.94 for Debtor's breach of his agreements with Sure
6 Sports, representing sums due under the relevant pre-bankruptcy agreements. Complaint, ¶¶ 8
7 and 62.

8 On September 13, 2022, Plaintiff commenced this adversary proceeding against Sure
9 Sports by the filing of a "Complaint For: (1) Violation of the Miller Ayala Athlete Agents Act,
10 Bus. & Prof. Code § § 18895, *et seq.*; and (2) Declaratory Relief" (the "Complaint"). On February
11 7, 2023, Sure Sports filed its "Answer and Affirmative Defenses; and Demand for Jury Trial" in
12 response to the Complaint (i) asserting, among other things, that the Bankruptcy Court does not
13 have the authority to "hear and determine" the Act Claim, i.e., enter a final judgment, and (ii)
14 demanding a jury trial.

15 The Complaint's first claim for relief, i.e., the Act Claim, asserts that the
16 "Underwriting Agreements" and "Fee Agreements" entered into between Debtor and Sure Sports
17 years before the commencement of Debtor's bankruptcy case (the "Agreements") and the money
18 Debtor paid pursuant thereto violated the Miller-Ayala Act codified by California Bus. & Prof.
19 Code § 18895 *et seq.* (the "Act"). By the Act Claim, Plaintiff seeks a monetary judgment against
20 Sure Sports (i) in an amount no less than \$452,414.31, representing money allegedly paid by
21 Debtor to Sure Sports, (see, Complaint, ¶ 76), plus (ii) actual and statutory damages of not less
22 than \$50,000 (see, Complaint, ¶ 77), plus (iii) punitive damages (see, Complaint, ¶ 77), plus (iv)
23 attorney's fees and costs (see, Complaint, ¶ 77).

24 The Act Claim is a state law claim that existed prior to Debtor's bankruptcy case, is not a
25 federal cause of action, is not a cause of action created by the Bankruptcy Code, and is not a core
26 proceeding "arising under title 11" or "arising in a case under title 11."

27 The Complaint's second claim for relief is for "Declaratory Relief" and seeks a judgment
28 declaring "that Sure Sports has no right to recover any amounts from the estate related to or in

1 connection with the Agreements, and may recover nothing from its Proof of Claim." Complaint,
2 ¶ 80.

III

THE BANKRUPTCY COURT DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO ENTER A FINAL JUDGMENT ON THE ACT CLAIM

A. The Act Claim is a "Non-Core" Matter.

8 Standing on its own, the Act Claim is a noncore matter which the Bankruptcy Court
9 cannot, without the consent of the parties, enter a final judgment.

10 28 U.S.C. § 157(b)(1) provides that "[b]ankruptcy judges may hear and determine all cases
11 under title 11 and all core proceedings arising under title 11, or arising in a case under title 11,
12 referred under subsection (a) of this section, and may enter appropriate orders and judgments,
13 subject to review under section 158 of this title."

14 28 U.S.C. § 157(c)(1) provides that "[a] bankruptcy judge may hear a proceeding that is
15 not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the
16 bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district
17 court, and any final order or judgment shall be entered by the district judge after considering the
18 bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters
19 to which any party has timely and specifically objected."

20 The Ninth Circuit Court of Appeals has "emphasized that courts 'should avoid
21 characterizing a proceeding as 'core' if to do so would raise constitutional problems.' (Citation
22 omitted.)" *In re Cinematronics, Inc.*, 916 F.2d 1444, 1450 (1990). *See also, In re Castlerock
23 Properties*, 781 F.2d 159, 162 (1986)("[W]e are persuaded that a court should avoid characterizing
24 a proceeding as 'core' if to do so would raise constitutional problems.")

25 Based upon 28 U.S.C. § 157, Bankruptcy Courts can hear and determine, i.e., enter a final
26 judgment, in "core proceedings," but cannot hear and determine, i.e., enter a final judgment, in
27 noncore proceedings without the consent of the parties.

28 The Ninth Circuit has firmly established that "actions that do not depend on bankruptcy

1 laws for their existence that could proceed in another court are considered 'non-core.'" *Security*
2 *Farms v. Merchant Brotherhood of Teamsters, etc.*, 124 F.3d 99, 1008 (9th Cir. 1997). *See also,*
3 *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990) ("actions which do not depend on the
4 bankruptcy laws for their existence and could proceed in another court are not core proceedings.")

5 There cannot be any dispute that (i) Plaintiff's Act Claim is a claim that "does not depend
6 on the bankruptcy laws for [its] existence" because it is a claim based exclusively on California
7 state law and (ii) Plaintiff could have commenced his Act Claim in the California state courts or
8 the U.S. District for the Northern District of California, due the existence of diversity subject
9 matter jurisdiction. Based upon the Ninth Circuit's explicit and unambiguous definition of a
10 "noncore proceeding," Plaintiff's Act Claim is a noncore proceeding and the Bankruptcy Court has
11 no authority to enter a final judgment on the Act Claim.

12 B. The Bankruptcy Court Does Not Have the Constitutional Authority to Enter a Final
13 Judgment in this Adversary Proceeding.

14 Notwithstanding the foregoing, Sure Sports acknowledges and recognizes that 28 U.S.C.
15 § 157(b)(2)(C) provides that "Core proceedings include, but are not limited to ... (C)
16 counterclaims by the estate against persons filing claims against the estate." However, as
17 recognized by the U.S. Supreme Court, 28 U.S.C. § 157(b)(2)(C) does not provide the Bankruptcy
18 Court with the necessary authority to hear and determine all "counterclaims by the estate against
19 persons filing claims against the estate." *See, Stern v. Marshall*, 564 U.S. 462, 482
20 (2011) ("Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final
21 judgment on [debtor's] counterclaim [to the creditor's proof of claim], Article III of the
22 Constitution does not.") and *Stern* at 469 ("We conclude that, although the Bankruptcy Court had
23 statutory authority to enter judgment on [debtor's] counterclaim [to the proof of claim], it lacked
24 the constitutional authority to do so.")

25 In *Stern*, prior to the debtor's bankruptcy case, the debtor had commenced an action in the
26 Texas state court against her husband's son asserting that the son fraudulently induced her husband
27 to sign a living trust that did not include her. The son denied such allegations. After debtor's
28 husband died, debtor commenced her bankruptcy case. In debtor's bankruptcy case, the son filed a

1 Complaint against debtor for nondischargeability (based on a defamation claim) and filed a proof
2 claim for money (based on damages from the alleged defamation by debtor). In response, debtor
3 filed a counterclaim against the son for tortious interference with the gift she expected from her
4 deceased husband and "argu[ed] that [the son's proof of] claim was unenforceable and that [the
5 son] should not receive any amount for it." *Id.* at 480. In *Stern*, as set forth above, the U.S.
6 Supreme Court held that, notwithstanding the statutory authority of 28 U.S.C. § 157(b)(2)(C), the
7 Bankruptcy Court, as an Article I court, did not have the constitutional authority to exercise
8 judicial power and hear and determine, i.e., enter a final judgment on, debtor's counterclaim. In
9 *Stern*, the Supreme Court stated that "we agree with [the son] that designating all counterclaims as
10 'core' proceedings raises serious constitutional concerns." *Id.* at 477.

11 Article III of the Constitution "commands that 'the judicial Power of the United States,
12 shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time
13 to time ordain and establish.' That Article further provides that the judges of those courts shall
14 hold their offices during good behavior, without diminution of salary." *Id.* at 469. It cannot be
15 disputed that the Bankruptcy Court is not an Article III Court. *See, Stern.*

16 In *Stern* at 487, the Supreme Court stated

17 [i]t is clear that the Bankruptcy Court in this case exercised the 'judicial
18 Power of the United States' in purporting to resolve and enter final judgment
19 on a state common law claim, just as the court did in *Northern Pipeline*. No
20 '**public right**' exception excuses the failure to comply with Article III in
21 doing so, any more than in *Northern Pipeline*. [The debtor] argues that this
22 case is different because the defendant is a creditor in bankruptcy [who filed
23 a proof of claim]. But the debtors' claims in the cases on which she relies
24 were themselves federal claims under bankruptcy law, which would be
25 completely resolved in the bankruptcy process of allowing or disallowing
26 claims. Here [debtor's] claim is a state law action independent of the federal
27 bankruptcy law and not necessarily resolvable by a ruling on the creditor's
28 proof of claim in bankruptcy. (Emphasis added.)

29 *Stern* then explained the difference between "public right" and "private right." "Public
30 right" claims are "those arising 'between the Government and persons subject to its authority in
31 connection with the performance of constitutional functions of the executive or legislative
32 departments.' (Citation omitted.)" *Id.* at 489. On the other hand, "private right" claims are

1 "matters ... 'of liability of one individual to another under the law as defined.' (Citations
2 omitted.)" *Id.* at 489. "[W]hat makes a right 'public' rather than private is that the right is
3 integrally related to particular Federal Government action." *Id.* at 490-491. *Stern* at 492 went on
4 and, citing to its prior decision in *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33 (1989), stated that
5 "[w]e explained that, '[i]f a statutory right is not closely intertwined with a federal regulatory
6 program Congress has power to enact, and if that right neither belongs to nor exists against the
7 Federal Government, then it must be adjudicated by an Article III court. (Citations omitted.)"
8 Thus, *Stern* at 493 concluded "that [debtor's] counterclaim ... does not fall within any of the
9 varied formulations of the public rights exception in this Court's cases. It is not a matter than can
10 be pursued only by grace of the other branches. ... The claim is instead one under state common
11 law between two private parties. It does not 'depend upon the will of Congress,' (citation omitted);
12 Congress has nothing to do with it. ... [and debtor's] claimed right to relief does not flow from a
13 federal statutory scheme."

14 Here, Plaintiff's Act Claim is not a public right claim. The Act Claim is not integrally
15 related to any particular Federal Government action. The Act Claim asserted is not a right that
16 belongs to or exists against the Federal Government. The Act Claim is a state law claim between
17 two private parties and seeks to adjudicate liability between two private parties, without any
18 connection to any federal government action. Congress had no involvement with the Act; nor
19 does the Trustee's claimed right to relief "flow from any federal statutory scheme." Thus, like the
20 debtor's counterclaim in *Stern*, the Act Claim is not subject to the public right exception and must
21 be "heard and determined" by an Article III court.

22 Additionally, *Stern* rejected the debtor's contention that the son's filing of a proof claim
23 amounts to consent to the jurisdiction of the Bankruptcy Court or confers authority in the
24 Bankruptcy Court for the adjudication of a debtor's counterclaim. *Id.* at 493-495. In this regard,
25 *Stern* stated "[the son] did not truly consent to the resolution of [debtor's] [counter]claim in the
26 bankruptcy court proceedings. He had nowhere else to go if he wished to recover from [debtor's]
27 estate." Accordingly, Sure Sports filing of its proof of claim against Debtor's estate has no bearing
28 on whether or not the Bankruptcy Court has the constitutional authority to "hear and determine"

1 Plaintiff's Act Claim.

2 Further, *Stern* ruled the Bankruptcy Court could not "hear and determine" debtor's
3 counterclaim "that simply attempts to augment the bankruptcy estate – the very type of claim that
4 we held in *Northern Pipeline* and *Granfinanciera* **must** be decided by an Article III court.
5 (Emphasis added.)" *Id.* at 495. *Stern* went on and ruled that the Bankruptcy Court,
6 notwithstanding 28 U.S.C. § 157(b)(2)(C), could not "hear and determine" debtor's counterclaim
7 to the son's proof of claim because "there was never any reason to believe that the process of
8 adjudicating [the son's] proof of claim would necessarily resolve [debtor's] counterclaim." *Id.* at
9 497. The Supreme Court at 498 explained that "because [debtor] sought punitive damages in
10 connection with her counterclaim, the Bankruptcy Court could not finally dispose of the case in
11 [debtor's] favor without determining whether to subject [the son] to the sort of 'retribution,'
12 'punishment[,] and deterrence,' (citation omitted), those damages are designed to impose. There,
13 thus was never reason to believe that the process of ruling on [the son's] proof of claim would
14 necessarily result in the resolution of [debtor's] counterclaim." Here, the Act Claim seeks punitive
15 damages. See, Complaint, ¶ 77. The resolution of the issue of punitive damages is not necessary
16 for the resolution of Sure Sports' proof of claim. The resolution of Sure Sports proof of claim will
17 not fully resolve the Act Claim and its claim for punitive damages. Thus, the Bankruptcy Court
18 cannot "hear and determine" Plaintiff's Act Claim.

19 Finally, with respect to *Stern*, the Supreme Court also determined that (i) debtor's
20 counterclaim was "in no way derived from or dependent upon bankruptcy law; it is a state tort
21 action that exists without regard to any bankruptcy proceeding" *id.* at 499 and (ii)
22 "*Granfinanciera*'s distinction between actions that seek 'to augment the bankruptcy estate' and
23 those that seek 'a pro rata share of the bankruptcy *res*,' *ibid.*, reaffirms that Congress may not
24 bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy estate; the
25 question is whether the action at issue stems from the bankruptcy itself or would necessarily be
26 resolved in the claims allowance process. (Emphasis in original.)" *Id.* at 499.

27 Here, Plaintiff's Act Claim (i) is an action to augment the bankruptcy estate (by seeking a
28

1 monetary recovery from Sure Sports)¹, (ii) is not derived from or dependent upon bankruptcy law
2 (it is a state law claim that existed prior to Debtor's bankruptcy case), (iii) does not stem from the
3 bankruptcy of Debtor, and (iv) would not be finally resolved in the claims allowance process (just
4 like in *Stern*, Plaintiff's punitive damage claim within the Act Claim will not be resolved in the
5 claims allowance process because the punitive damage issue is not necessary for the resolution of
6 Sure Sports' proof of claim). Therefore, like the Bankruptcy Court in *Stern*, and in accordance
7 with the dictates of *Stern*, the Bankruptcy Court does not have the constitutional authority to "hear
8 and determine" Plaintiff's Act Claim.

9 In *Walden v. Stone*, 698 F.3d 910 (6th Cir. 2012), the Bankruptcy Court was faced with the
10 exact issue presented in this adversary proceeding. In *Walden*, the debtor/plaintiff (Stone), pre-
11 bankruptcy, was defrauded into selling the assets of his business to defendant (Walden). In return,
12 defendant promised debtor/plaintiff that he would pay in full and satisfy certain obligations owed
13 by debtor/plaintiff (including obligations secured by debtor/plaintiff's home) and that
14 debtor/plaintiff would receive 40% of the equity in the new business to be established by
15 defendant using the assets defendant acquired from debtor/plaintiff. Debtor/plaintiff transferred
16 the subject to assets to defendant. However, defendant (i) failed to pay off and satisfy the
17 obligations of debtor/plaintiff and instead purchased such obligations and (ii) refused to issue any
18 equity in the new business (formed using the assets acquired from debtor/plaintiff) to
19 debtor/plaintiff. Thereafter, defendant commenced an action against debtor/plaintiff to collect the
20 debts defendant purchased from debtor's/plaintiff's creditors, which debts were supposed to have
21 been satisfied by defendant. Debtor/plaintiff then commenced his chapter 11 case.

22 In the chapter 11 case, debtor/plaintiff filed a complaint against defendant seeking two
23 types of relief: (i) that plaintiff/debtor (and the property of plaintiff/debtor acting as collateral) be
24 discharged from his debts to defendant (consisting of the obligations plaintiff/debtor owed to third
25

26 ¹ See also, *In re Deitz*, 469 B.R. 11, 18 (9th Cir. B.A.P. 2012) ("Even in the few cases we have
27 located suggesting an expansive interpretation of *Stern*, the courts generally limit their concerns to
those actions in bankruptcy courts that seek to augment the bankruptcy estate at the expense of
28 third parties ... because those legal actions seek through a money judgment to take the defendant's
property and that adjudication can only be made by a member of the independent Article III
judiciary. (Citations omitted.)"

1 parties that were purchased by defendant) and (ii) for affirmative relief for damages, including
2 punitive damages. At the conclusion of the trial on the claims of plaintiff/defendant, the
3 Bankruptcy Court entered judgment which (i) invalidated all of plaintiff/debtor's obligations to
4 defendant, and (ii) awarded plaintiff/debtor (a) \$1,191,374 in compensatory damages and (b)
5 \$2,000,000 in punitive damages. Defendant appealed to the U.S. District Court, which affirmed
6 the judgment. On appeal to the Sixth Circuit Court of Appeals, the Sixth Circuit reversed the
7 judgment because the Bankruptcy Court, as an Article I court, did not have the constitutional
8 authority to "hear and determine," i.e., enter a final judgment, on plaintiff/debtor's claims.

9 First, like *Stern*, *Walden* determined that the claims of plaintiff/debtor were "private rights"
10 and, therefore, the "public right" exception did not apply to allow the Bankruptcy Court to enter a
11 final judgment against defendant. *Walden* at 918-919.

12 Next, *Walden* analyzed (i) whether the Bankruptcy Court had the constitutional authority
13 to enter a final judgment on plaintiff/debtor's claim to disallow the claims of defendant and (ii)
14 whether the Bankruptcy Court had the constitutional authority to enter a final judgment on
15 plaintiff/debtor's affirmative monetary claims. The Sixth Circuit Court of Appeals determined that
16 while the Bankruptcy Court did have authority to disallow the claims of defendant, it further held
17 that the Bankruptcy Court did not have the constitutional authority to enter a final judgment on
18 plaintiff/debtor's claims for affirmative monetary relief.

19 In *Walden* at 919, the Court stated:

20 *Stern* thus provides a summary of the law in this area: When a debtor pleads
21 an action under federal bankruptcy law and seeks disallowance of a
22 creditor's proof of claim against the estate—as in *Katchen*—the bankruptcy
23 court's authority is at its constitutional maximum. 131 S.Ct. at 2617–18.
24 But when a debtor pleads an action arising only under state-law, as in
25 *Northern Pipeline*; or when the debtor pleads an action that would augment
26 the bankrupt estate, but not “necessarily be resolved in the claims allowance
27 process[,]” 131 S.Ct. at 2618; then the bankruptcy court is constitutionally
28 prohibited from entering final judgment. *Id.* at 2614.

29 Concerning the Bankruptcy Court's lack of constitutional authority to hear and determine,
30 i.e., enter a final judgment, on plaintiff/debtor's claims for affirmative relief and monetary
31 damages, the *Walden* court determined that such claims (i) "sought money damages," (ii) "arose
32

1 exclusively under state law and existed without regard to any bankruptcy proceeding," and (iii)
2 "only sought money damages to augment the bankruptcy estate." *Walden* at 921. *Walden* at 921
3 further ruled that "there was never any reason to think that [debtor's] disallowance claims would
4 necessarily resolve his affirmative claims." Accordingly, *Walden* at 921 held that "[t]he
5 bankruptcy court's judgment with respect to those [affirmative] claims [of plaintiff/debtor],
6 therefore, was entered in violation of Article III.

7 With respect to its holding that the resolution of the debtor's claim disallowance claim
8 would not "necessarily resolve his affirmative claims," *Walden* determined that
9 "[plaintiff/debtor's] affirmative claims required him to prove facts beyond those necessary to
10 disallow his [claim] disallowance claim." *Id.* at 921. In support thereof, *Walden* stated that
11 "[m]oreover, just as in *Stern*, [plaintiff/debtor']s request for punitive damages required him to
12 show that [defendant's] conduct warranted retribution and deterrence. *See id.* Hence there was
13 never any reason to think that [plaintiff/debtor's] disallowance claims would necessarily resolve
14 his affirmative claims. The bankruptcy court's judgment with respect to those claims, therefore,
15 was entered in violation of Article III."

16 Here, Plaintiff's Act Claim (i) seeks money damages, including punitive damages, (ii)
17 arose exclusively under state law and exists without regard to any bankruptcy proceeding, and
18 (iii) only seeks money damages to augment Debtor's bankruptcy estate.

19 Additionally, the resolution of Plaintiff's Declaratory Relief claim, i.e., the disallowance
20 claim, will not "necessarily fully resolve" the Act Claim. Just like in *Stern* and *Walden*, the
21 affirmative claim of Plaintiff, i.e., the Act Claim, seeks punitive damages, which requires a
22 showing, by clear and convincing evidence, of "oppression, fraud or malice." See, California
23 Civil Code § 3294. Pursuant to the Supreme Court's holding in *Stern*, this punitive damage claim
24 alone is sufficient to require that Plaintiff's Act Claim be heard and determined by an Article III
25 court. Further, in the Act Claim, Plaintiff must prove actual damages, which is not required to
26 disallow Sure Sports' proof of claim (all that is alleged to be necessary to disallow Sure Sports'
27 claim is a finding that the Act applied to Sure Sports and that Sure Sports did not comply with the
28 Act; if these findings are made, Sure Sports proof of claim will be disallowed). Accordingly, and

1 it cannot be truthfully disputed, that the resolution of the Declaratory Relief/claim disallowance
2 claim will not fully resolve the Act Claim.

3 Based upon the Supreme Court's instructions and rulings in *Stern*, the Bankruptcy Court
4 cannot "hear and determine" or enter any final judgment on and with respect to Plaintiff's Act
5 claim.

6 **IV**

7 **SURE SPORTS IS ENTITLED TO A JURY TRIAL ON THE ACT CLAIM**

8 "The Seventh Amendment provides: 'In Suits at common law, where the value in
9 controversy shall exceed twenty dollars, the right of trial by jury shall be preserved' We have
10 consistently interpreted the phrase 'Suits at common law' to refer to 'suits in which *legal* rights
11 were to be ascertained and determined, in contradistinction to those where equitable rights alone
12 were recognized, and equitable remedies were administered. (Emphasis in original.)'"

13 *Granfinanciera* at 42. "The Seventh Amendment protects a litigant's right to a jury trial only if a
14 cause of action is legal in nature and it involves a matter of 'private right.'" *Id.* at 42, fn. 4.
15 "Where an action is simply for the recovery and possession of specific real or personal property, or
16 for the recovery of a money judgment, the action is one of law." *Id.* at 46. *See also, Pernell v.*
17 *Southhall Realty*, 416 U.S. 363, 370 (1974)("Where an action is simply for the recovery ... of a
18 money judgment, the action is one at law.")

19 "[Congress] lacks the power to strip parties contesting matters of private right of their
20 constitutional right to a trial by jury." *Granfinanciera* at 51-52.

21 Congress' power to block application of the Seventh Amendment to a cause
22 of action has limits. Congress may only deny trials by jury in actions at law,
23 we said, in cases where "public rights" are litigated: "Our prior cases
24 support administrative factfinding in only those situations involving 'public
25 rights,' e.g., where the Government is involved in its sovereign capacity
under an otherwise valid statute creating enforceable public rights. Wholly
private tort, contract, and property cases, as well as a vast range of other
cases, are not at all implicated." (Citation omitted.)

26 *Id.* at 51.

27

28

1 As shown above, Plaintiff's Act Claim is a "private right," not a "public right.² Thus,
2 Congress cannot, by 28 U.S.C. § 157 (or any other legislation), deprive Sure Sports of its' right to
3 a jury trial in defending the Act Claim. Additionally, the Act Claim is "legal in nature" and not an
4 equitable claim because it seeks the recovery of a money judgment.

5 Accordingly, Sure Sports is entitled to a jury trial on the Act Claim.³

6 V

7 CONCLUSION

8 For the reasons set forth above, Sure Sports respectfully requests that the Bankruptcy
9 Court enter an Order finding, declaring and ruling that (i) the Bankruptcy Court does not have the
10 constitutional authority to "hear and determine," i.e., enter a final judgment, on the Act Claim and
11 (ii) Sure Sports is entitled to a jury trial on the Act Claim.

12 DATED: April 11, 2023

13 JEFFER MANGELS BUTLER & MITCHELL LLP

14 By: _____ /s/ Thomas M. Geher
15 _____
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22 Attorneys for Sure Sports, LLC

23 _____
24 ² The U.S. Supreme Court has "defined 'private right' as 'the liability of one individual to another
under the law as defined' (citation omitted), in contrast to cases that 'arise between the
Government and persons subject to its authority in connection with the performance of
constitutional functions of the executive or legislative departments. (Citation omitted.)'"
Granfinanciera at 51, fn. 8. Obviously, the Act Claim is not a "public right" claim. The Act
Claim is a "private right" claim.

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26 ³ 28 U.S.C. § 157(e) provides that "[i]f the right to a jury trial applies in a proceeding that may be
27 heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if
specially designed to exercise such jurisdiction by the district court and with the express consent
of all the parties." Here, as shown above, the Bankruptcy Court does not have the constitutional
28 authority to "hear and determine" the Act Claim. Further, Sure Sports does not consent to the
Bankruptcy Court conducting the jury trial.